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*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

February 1, 2013

*Re: Prince George's County Council, Sitting as the District Council
(Susan Gervasi, Complainant)*

We have considered the complaint of Susan Gervasi ("Complainant") that the Prince George's County Council, sitting as the District Council ("Council"), violated the Open Meetings Act (the "Act") during its September 10, 2012 meeting when the People's Zoning Counsel ("People's Counsel") instructed her to conduct her videotaping of the meeting from the back of the room.

Certainly, a public body may designate a reasonable location from which a person may videotape a public meeting and take other reasonable measures to avoid disruption by that activity, and, in this case, Complainant was permitted to videotape the meeting from the back of the room. Still, we are concerned by the extent to which the Council's presiding officer appears to have ceded to the People's Counsel, an attorney in the proceedings before it, her authority to take those steps, particularly as his stated basis for instructing the Complainant to move to the back of the meeting room was incorrect in several respects. We will explain the principles applicable to the recording of a meeting by members of the public. As set forth below, however, we are unable to determine whether

the request that Complainant move to the back of the room had a legal basis, or, instead, was based on one of the incorrect grounds stated by People's Counsel.

We are also concerned by, and will briefly address, the disparity between the version of events apparently provided to the County's legislative officer, who responded to the complaint on the County's behalf, and the contents of the audiotape that the County provided upon our request.

Allegations and Facts—the Complaint, the Response, and the Audiotape

According to Complainant, she attended the District Council's September 10, 2012 meeting to film the Council's proceedings on a controversial land use matter on which she has been making a documentary. She was seated in the front row, filming the council members and witnesses with a "small handheld camera," when People's Counsel "loudly and publicly challenged in an aggressive way my right to sit there and ordered me to sit at a press table in the back of the large room." People's Counsel "stated that because the proceedings were being recorded by official channels, this somehow made my recording less valid." Complainant moved to the press table but was "embarrassed and stunned to be singled out, since I had freely filmed in the chambers in the past."

Complainant further alleges that on "many previous occasions as a journalist," she "had filmed from the front of the room before" She states that People's Counsel had previously "ordered" her to turn her camera off during a hearing before the Zoning Hearing Examiner, and that, on that occasion, "he or the Examiner said that I should not be allowed to film those who did not wish to be filmed at this public hearing." Complainant states, "In neither case was I blocking an aisle or interfering with the conduct of public business."

The Council responds with this summary of the events in question:

[People's Counsel] conducted proceedings from his seat in the well of the hearing room nearest the public seating area. During argument, [People's] Counsel interrupted his examination of witnesses to address Complainant's recording activity. [People's] Counsel stated that Complainant's recording and equipment use during the proceedings was disruptive and distracting, and he requested Complainant relocate to the rear of the room to resume the recording. Complainant objected but complied with [People's] Counsel's request. The Chair of the District Council concurred with the

request of [People's] Counsel, adding that other members of the public observing the proceedings may not want to be part of the audio or video recording. [People's] Counsel restated that the basis for the relocation request was distraction and disruption of the ongoing proceedings.

The Council further explains that, pursuant to the Act, it has adopted regulations governing the conduct of members of the public who attend its meetings.¹ Under the Council's Rule 4.7, "[p]ersons who desire to televise, videotape, photograph, broadcast or record open meetings shall make appropriate arrangements with the Clerk in advance of the meeting." The Council's attorney states that neither the complaint nor the meeting file reflects any request by Complainant to make such arrangements. Stating that "Complainant was not prohibited from videotaping . . . [but] rather was merely requested to move the recording effort . . . to minimize disruptive impact to the witnesses, advocates, and public officials engaged in the oral arguments," the Council argues that the "relocation request . . . amounts to a lawful exercise of regulatory power under [the Act]." Citing 1 *OMBC Opinions* 140, 141 (1995), the Council acknowledges that the possible reluctance of members of the public to be filmed at a public meeting is not grounds for prohibiting that activity.

On our request, the Council provided us with a copy of the audiotape of the proceeding. The portion we quote below falls after the conclusion of one matter before the Council and immediately before the next.

[CHAIR]²: Thank you. At this point I guess we'll move onto staff to give us orientation for the remainder of the cases. I do have to ask at this point is there anyone in here who wishes not to be photo'ed or videoed by a private entity. Because we do have someone who is videoing so I need to ask that question if there is anyone who objects then I would have to ask the individual to stop.

[PEOPLE'S COUNSEL]: Madam chair, I will object.

¹ State Government Article ("SG") § 10-507(b) provides: "A public body shall adopt and enforce reasonable rules regarding the conduct of persons attending its meetings and the videotaping, televising, photographing, broadcasting, or recording of those meetings."

² Our transcription attributes the various statements to the Chair, People's Counsel, and Complainant; the submissions do not suggest that anyone else spoke.

Young lady who is taking the video—we do not allow signs in this particular proceeding nor do we allow video recording. There is an official record that is being made of this proceeding. If you want to videotape you’re going to have to go to the back of the room where the media is located, not sitting in the front. Video recording individuals will intimidate them with regard to the oral argument and other statements they want to make.

No, I don’t want to hear from you. You’re going to have to go to the back of the room if that is what you want to do.

[COMPLAINANT]: May I just say, state [inaudible] Maryland law on this, because when you challenged me at a previous hearing, I discovered that Maryland State law holds an open hearing law [inaudible] that you can’t—people who speak at a public hearing do not have the right to say I don’t want to be videotaped –

[CHAIR]: We’re just asking that if you would go to the back of the room for taping –

[PEOPLE’S COUNSEL]: The back—

COMPLAINANT: I go under protest, because I think it’s a violation of State Sunshine Law.

CHAIR: All the media is in the back of the room.

On one fact, all agree: Complainant was allowed to videotape the proceedings.

Applicable legal principles

We begin by summarizing the principles we have applied to complaints involving the recording³ of a meeting by a member of the public:

- (1) a public body may regulate recording, but not prohibit it;⁴

³We use “recording,” here to mean “videotaping, televising, photographing, broadcasting, or recording,” as specified in SG § 10-507(b).

⁴1 *OMCB Opinions* 137, 140 (1995); *see also* 5 *OMCB Opinions* 60, 68 (2006).

(2) a public body's restrictions on recording must be "reasonable,"—that is, they must be "needed to protect the legitimate rights of others at the meeting" and do so "by means consistent with the goal of the Act";⁵

(3) a public body may require a person who wishes to use video recording equipment to check in with staff in advance so that staff may inform the person of the rules, but the public body should give the public "fair notice" of such a requirement;⁶

(4) a person filming a public meeting may film the people in attendance, as well as the members of the public body and speakers, as they do not "have the right to be protected against . . . the lens of an observer's camera";⁷

(5) the public body may specify the locations from which a person may record and restrict that person from "moving around" to record;⁸

(6) the fact that a person is not a member of the press has no bearing on that person's right to record a meeting;⁹

(7) the fact that the public body prepares its own transcript or audio recording has no bearing on a person's right to make his or her own recording.¹⁰

⁵ 1 *OMCB Opinions* at 140.

⁶ 5 *OMCB Opinions* 22, 24 (2006).

⁷ 1 *OMCB Opinions* at 141 ("The size of the crowd, its composition, its expression—all these are an integral part of what any observer can see at any meeting open to the public. There is no right to be protected against the gaze of an observer in a public forum, or against the lens of the observer's camera."). See also 5 *OMCB Opinions* at 68 (stating that neither the members of a public body nor their audience has a "legitimate claim to be free from having their image recorded").

⁸ See 5 *OMCB Opinions* at 24 (stating, as examples of permissible rules, "that flash equipment is not to be used and that videotaping is to be done from particular locations"); 5 *OMCB Opinions* 154, 159 (2007) ("the denial of one particular camera angle does not undermine citizens' right to observe or record the proceedings" and "a rule that requires all members of the audience to stay in the audience area . . . is [a] reasonable rule.").

⁹ 5 *OMCB Opinions* at 25 (explaining that if a public body were to have a policy that permitted the media, but not members of the public, to record a meeting, "it would violate the Act.").

In short, a public body may adopt and enforce rules to ensure that a member of the public will not record a meeting in a disruptive way, and, further, may reasonably require people who wish to record its meetings to make arrangements with staff in advance and to sit in a particular place. Further, the Act entitles a public body to remove an individual when the “presiding officer determines that the behavior of [that] individual is disrupting an open session” SG § 10-507(c). A presiding officer thus has the authority to determine that a person’s conduct is disruptive and, by implication, to address that problem by asking her to move. We interpret these principles to include an element of reasonableness—that is, public bodies should apply their rules consistently and fairly.

Discussion

As the principles we set forth above make clear, the Council could have asked Complainant to move either (1) on the basis of a determination by the Chair that Complainant’s conduct was disrupting the proceeding or (2) by way of enforcing its rule—if the public had fair notice of that rule—that those who wish to videotape make prior arrangements with staff. The first scenario did not occur: the Chair did not determine that the meeting was being disrupted. Rather, during a pause in the proceedings, she called Complainant’s videotaping activity to the attention of those in attendance, asked whether anyone objected to being filmed, and stated that “if there is anyone in here who objects,” she “would have to ask the individual to stop.” As the response acknowledges, the Act does not make the recording of a public meeting conditional on the consent of the persons present. And, while the Council offers that People’s Counsel later “restated [that] the basis for the relocation request was distraction and disruption of the ongoing proceedings,” a *post hoc* statement of an advocate in the proceedings about why he asked a member of the public to move does not prove that the Chair “concurred” in the request on that particular basis.

Whether the second scenario—enforcement of the pre-registration rule—occurred is unclear at best. Problematically, the Chair did not initiate the instruction to Complainant to move. Instead, People’s Counsel, who may appear as counsel in proceedings before the Council but is not a member of it,¹¹ addressed Complainant directly and gave that instruction. He stated four grounds. Three were incorrect: contrary to his statements, the Council does allow videotaping, and the facts that a public body makes its own recording or that members of the audience may not wish to be filmed have no bearing on a person’s right to record a meeting. No one cited the Council’s pre-registration rule as grounds for instructing Complainant to move, and it is unclear from the submissions before us whether the Council

¹⁰ 3 *OMCB Opinions* 356, 357(2003) (explaining that a public body may not prohibit videotaping on the grounds that a transcript will be available, because transcripts do not “capture facial expressions, tones of voice, and other aspects of a meeting that an attendee may wish to memorialize”).

¹¹ Prince George’s County Code §§ 27-136 and 27-139.01.

consistently enforces either that rule or a requirement that videotaping be done from the back of the room.

In short, we do not know whether the Chair acted on a legally-incorrect basis for “concurring” in People’s Counsel’s instruction to Complainant to move or whether, instead, the Chair was simply and consistently enforcing a reasonable restriction on recording and a practice of having videotaping occur from the back of the room. Still, the Council permitted Complainant to videotape the proceedings.

We turn briefly to the factual disparities between the Counsel’s response, from which we had understood that the events occurred during People’s Counsel’s argument in ongoing proceedings and that he had interrupted his argument because he felt disrupted, and the audiotape, which shows that the events occurred after one matter had concluded and before the next had begun, that the Chair raised the issue, and that People’s Counsel had not been in the middle of an argument. On the other hand, we note that Complainant submitted this complaint approximately six weeks after the meeting. We encourage members of the public to file their complaints promptly, so that memories of the meeting will be fresh, and we ask members of public bodies to review their responses for accuracy.

Conclusion

We cannot ascertain whether this public body had a permissible basis for acquiescing in the restriction placed on Complainant’s recording of the meeting. We are therefore unable to resolve the complaint. *See* SG 10-502.5(f)(2).

Open Meetings Compliance Board

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